

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

COREY C. CRAIG)	
Claimant)	
VS.)	
)	Docket No. 1,059,210
U.S.D. 465)	
Respondent)	
AND)	
)	
HARTFORD FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 27, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

APPEARANCES

Claimant appeared by his attorney, Matthew L. Bretz, of Hutchinson, Kansas. Respondent appeared by its attorney, Timothy A. Emerson, of Overland Park, Kansas.

RECORD

This Board Member has considered the same record as the ALJ, including the transcript of Preliminary Hearing held on March 22, 2012, with the attached exhibits and the transcript of the Continuation of Preliminary Hearing held June 26, 2012, with attached exhibits.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment to his wrist citing K.S.A. 44-508(f)(2), which reads: "An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

The claimant requests review of whether the ALJ erred in concluding that claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment and that the need for medical treatment is causally related to his work injury. Claimant argues that the ALJ's Order should be reversed and claimant's injury deemed compensable, as he has proven that the work injury was a prevailing factor in his need for treatment, with the accident being an undesigned, sudden and unexpected traumatic event which occurred while claimant was working in an awkward position.

Respondent argues contends that the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked for respondent for 11 years in its maintenance and custodial departments. On October 26, 2011, claimant was in the boys' restroom on his knees cleaning the urinals when he heard a pop in his left shoulder and experienced pain that went down to his elbow and wrist. At the time, claimant didn't think anything of it, but he still reported the incident to his boss. Claimant's boss gave him the paperwork to file a workers compensation claim and at first claimant was reluctant, but his supervisor insisted.

The next day, claimant returned to work with significant pain in his left wrist but no pain in his left elbow or shoulder. Claimant reported this to his supervisor, who arranged for claimant to see a doctor. Claimant admits to having prior problems with his left wrist. But that was several years ago and claimant had suffered no long term effects from that incident. Claimant continues to work for respondent in the same job with a five pound weight limit.

Claimant was initially treated by his family doctor, Bryan Davis, M.D., and was provided physical therapy and instructed to wear wrist splints. Claimant was also referred for an MRI of the left wrist. The MRI identified degenerative changes in the wrist and claimant was referred to board certified orthopedic surgeon Prince T. Chan, M.D. Claimant was first examined by Dr. Chan on December 23, 2011, and was diagnosed with avascular necrosis of the lunate bone or Kienbock's disease. This condition stems from a loss of blood flow to the lunate bone, resulting in the death of the bone. Dr. Chan described claimant's condition as severe. The treatment recommendation involved the above discussed physical therapy and splinting. Additionally, Dr. Chan has recommended that claimant have surgery to increase blood flow in his wrist. The surgery would involve a proximal row carpectomy with AIN/PIN nerve neurectomy. A fusion was rejected as it would severely limit the range of motion in claimant's wrist.

In a letter dated April 25, 2012, Dr. Chan stated that claimant's work activities did not cause this condition. He opined that the work injury may have "aggravated his pre-existing condition".¹

Claimant was referred by his attorney to board certified orthopedic surgeon David Hufford, M.D., who examined claimant on May 1, 2012, and diagnosed claimant with left wrist pain with underlying degenerative osteoarthritic change. He opined that within a reasonable degree of medical probability claimant's wrist pain is due to an aggravation of his underlying degenerative arthritis. Dr. Hufford does not believe that claimant's job caused his injury. He opined that it may have aggravated a preexisting condition. Dr. Hufford noted that the new Kansas worker's compensation statute "sets the bar extremely high when a work injury causes a pre-existing condition to become symptomatic." He went on to opine that claimant's work injury of October 26, 2011, appears to have "rendered this condition symptomatic".² He also stated that the etiology for Kienbock's disease is multi-variant and not due to repetitive trauma in the performance of claimant's work duties over the previous 11 years. He also raised the possibility of surgical intervention.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f) states in part:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

¹ P.H. Trans. (Jun. 26, 2012), Resp. Ex. 2.

² P.H. Trans. (Jun. 26, 2012), Cl. Ex. 2.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

...

(iii) accident or injury which arose out of a risk personal to the worker; or

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

It is not seriously contested that claimant's accident occurred in the course of his employment with respondent. There is no indication in this record that claimant was injured at any other time or in any other circumstance than that described in his testimony. The more serious question asks whether claimant's accident arose out of his employment with respondent. Dr. Hufford was correct in his analysis of the new Kansas worker's compensation statute and its more stringent burdens. No longer does the simple aggravation of a pre-existing condition render an injury compensable. Additionally, the accident must now be the prevailing factor causing the *injury, medical condition, and resulting disability*.

Here, the accident on October 19, 2011, caused an injury to claimant's left upper extremity. But, neither Dr. Chan nor Dr. Hufford can say that the accident was the prevailing factor causing the avascular necrosis in claimant's left wrist. Both agree the accident aggravated a pre-existing condition, but are unwilling or unable to take the next step in determining the "prevailing factor".

The denial of benefits in this instance is a harsh result. But, this result appears to have been contemplated by the Kansas legislature with the creation of this new law. This Board Member finds that claimant has failed to satisfy his burden or proving that the accident on October 19, 2011, was the prevailing factor leading to the avascular necrosis in his left wrist. The denial of benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that the accident on October 19, 2011, was the prevailing factor causing the medical condition for which claimant seeks benefits. The denial of benefits in this matter is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated June 27, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
matt@bretzpilaw.com@

Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
timothy.emerson@thehartford.com
denise.allen@thehartford.com

John D. Clark, Administrative Law Judge

³ K.S.A. 2011 Supp. 44-534a.